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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS OF THE STATE OF WASHINGTON
Division III

Court of Appeals No. 338681
Stevens County Superior Court No. 13-3-00187-1

In re:

LANE LEHMAN,

Petitioner/Appellant,

and

CYNTHIA LEHMAN (n.k.a. LINCOLN),

Respondent/Appellee.

APPELLANT'S OPENING BRIEF

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**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

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I. SUMMARY OF ARGUMENT

The trial court erred when it modified the *Order of Child Support* in this case. The court did not have authority to modify portions of the order that were unrelated to postsecondary support, and it failed to fulfill the statutory requirements for a proper award of postsecondary support. In addition to the legal errors, the trial court's findings were unsupported by substantial evidence in the record. The trial court also erred when it denied Mr. Lehman's *Motion to Vacate* and entered findings of fact without substantial evidence in the record to support them.

II. ASSIGNMENTS OF ERROR

1. The trial court exceeded its authority when it modified child support for the parties' minor child.
2. The trial court exceeded its authority when it modified the child support payment schedule in the original *Order of Child Support*.
3. The trial court exceeded its authority when it added an automatic adjustment of support to the *Order of Child Support*.
4. The trial court exceeded its authority when it modified the *Order of Child Support* to add the requirement that the parties proportionally split "educational expenses."
5. The trial court exceeded its authority when it modified the *Order of Child Support* to require the parties to proportionally split the cost of driver's education for the parties' minor child.
6. The trial court exceeded its authority when it provided Ms. Lincoln a credit for payment of health insurance without evidence of such payment and without determining which parent was obligated to provide insurance.
7. The trial court erred when it determined child support for the parties' minor child based on a one-child family calculation (without substantial

evidence to support that finding) and determined the standard calculation was \$877/month for the parties' minor child. (CP 159.)¹

8. The trial court erred when it entered an order awarding postsecondary support without considering all the factors pursuant to RCW 26.19.090(2).
9. The trial court erred when it ordered the father to pay the entirety of the parents' share of postsecondary support without review of the father's financial circumstances.
10. The trial court erred when it determined that postsecondary payments by the father should be made to the mother through the Washington State Support Registry in violation of RCW 26.19.090(6). (CP 150).²
11. The trial court erred when it conducted a hearing in violation of RCW 26.09.175(5), which requires that responsive pleadings must be filed prior to any hearing.
12. The trial court erred when it accepted incomplete worksheets in violation of RCW 26.19.035(3).
13. The trial court erred when it failed to properly conduct a trial on the affidavits, proceeding without any pleadings, affidavits (including a *Financial Declaration* or *Washington State Child Support Worksheets*) or other admissible evidence from the father.
14. The trial court erred when it determined that modification of the child support order should be granted for reasons that had not been included in the *Petition for Modification of Child Support*. (CP 150).³
15. The trial court erred when it determined that there was basis for the addition of an automatic adjustment of support. (CP 150)⁴
16. The trial court erred when it modified other aspects of the child support order beyond the entry of post-secondary support. (CP 156.)⁵
17. The trial court erred when it found that Makayla Lehman was *in fact* dependent and relying upon the parents for the reasonable necessities of life based on her inability to earn income as a full time student. (CP 150)⁶
18. The trial court erred when it determined that Mr. Lehman's actual monthly net income was \$4,780/month. (CP 157.)⁷

19. The trial court erred when it determined that the child support amount in Section 3.5 did not deviate from the standard calculation. (CP 159.)⁸
20. The trial court erred when it found that a deviation was not requested. (CP 159.)⁹
21. The trial court erred when it denied Mr. Lehman's *Motion to Vacate*.
22. The trial court erred when it found that "the seven factors as outlined in RCW 26.19.090(2) were considered" in its order entered on February 18, 2016.
23. The trial court erred when it found that "the factors did have substantial evidence, therefore the statute has been followed and the decision was supported by the evidence" in its order entered on February 18, 2016.
24. The trial court erred when it found "there were no irregularities" in the proceeding that would cause the court to vacate the order under CR 60 (b)(1) pursuant to case law" in its order entered on February 18, 2016.
25. The trial court erred when it found "the court considered the responsive pleadings as filed by counsel for Petitioner in making its decision on post-secondary support and child support" in its order entered on February 18, 2016.
26. The trial court erred when it found that "the actual documents filed in response to the motion by the petitioner constituted evidence" in its order entered on February 18, 2016.
27. The trial court erred when it found that "the petitioner did in fact respond to the motion" in its order entered on February 18, 2016.
28. The trial court erred when it found that "he waived any right to further respond by participating in the hearing without objection" in its order entered on February 18, 2016.
29. The trial court erred when it found that it "made the necessary findings under RCW 26.19.090 when it concluded that the child was in fact a dependent and relying upon the parents for the reasonable necessities of life" in its order entered on February 18, 2016.

30. The trial court erred when it found that “the pleadings filed by the mother and the father were sufficient to make findings under the seven factors to be considered by the court” in its order entered on February 18, 2016.
31. The trial court erred when it found “it was not feasible for the payments to be made directly to the institution” in its order entered on February 18, 2016.
32. The trial court erred when it found that the language in the statute regarding postsecondary payments “is not mandatory and leaves discretion to the court” in its order entered on February 18, 2016.
33. The trial court erred when it found that “both parties agreed at the time of hearing after lengthy argument that the payments would be made directly to the mother” in its order entered on February 18, 2016.
34. The trial court erred when it found that it “considered the needs of the child in the home as well as all other relevant factors to be considered when ruling on the issue of child support for the child still in the mother’s home” in its order entered on February 18, 2016.
35. The trial court erred when it found that there was “no mistake” made that would allow vacation in its order entered on February 18, 2016.
36. The trial court erred when it found there were “no fraudulent misrepresentations” made by the daughter and when it found that she was not cohabitating with a boyfriend and that there was “no fraud or misrepresentation” in its order entered on February 18, 2016.
37. The trial court erred when it found that “the father did participate in his case through counsel” and that it could not vacate under current case law in its order entered on February 18, 2016.

III. ISSUES PRESENTED

- A) Whether the trial court erred when it modified a portion of the child support order unrelated to postsecondary educational support without first finding a substantial change in circumstances or an exception to the requirement that a substantial change in circumstances be demonstrated.
- B) Whether the trial court erred when it violated substantive and procedural statutory requirements and entered postsecondary

educational support based on findings for which there was no substantial evidence in the record.

- C) Whether the trial court erred when it denied Mr. Lehman's *Motion to Vacate* and entered findings of fact without substantial evidence in the record to support them.

IV. STATEMENT OF THE CASE

Mr. Lane Lehman and Ms. Cynthia Lincoln (f.k.a. Lehman) dissolved their marriage in 2014. (CP 2.) The parties have two children: Levi, who is 15 years-old, and MaKayla who is 18 years-old. (CP 157.) This appeal arises from a child support modification proceeding that was subsequently filed by Ms. Lincoln approximately one year after the trial court entered an *Order of Child Support* in the original dissolution proceeding.

MAY 8, 2014

The trial court entered a *Decree of Dissolution, Findings of Fact and Conclusions of Law*, and an *Order of Child Support* in this case. (CP 1-27.)

Decree of Dissolution: As part of a disproportionately large property settlement in Ms. Lincoln's favor, she was awarded approximately \$65,997 in funds situated in various bank accounts. (CP 1-17.)

Order of Child Support (Original): In 2014, the trial court found that Mr. Lehman had an actual monthly net income of \$3,828/month and that Ms. Lincoln was voluntarily unemployed with an imputed monthly net income of \$1,593/month. (CP 19-20.) Mr. Lehman was ordered to pay \$558.83/month for Makayla and \$558.83/month for Levi, and the total sum was rounded to a

transfer amount of \$1,118/month. (CP 20-21.) The order stated that Mr. Lehman was to pay his obligation in two monthly installments (with the first half being paid before the 5th of the month and the second half to be paid on or before the 20th of the month). (CP 21.)

The order also indicated that “[t]he right to request post secondary support is reserved, provided that the right is exercised before support terminates as set forth in paragraph 3.13,” and it noted that “long distance transportation expenses” would be split proportionally. (CP 22.) No other additional expenses were included.

The trial court did not order a periodic adjustment under *Section 3.16*, nor did it order either party to provide health insurance or contribute a sum certain to payment of health insurance premiums. (CP 23.)

Washington State Child Support Worksheets (Original): The basic child support obligation in the worksheets was calculated based on a two-child household, and the proportional share of income attributable to each party was 72.2% to Mr. Lehman and 27.8% to Ms. Lincoln. (CP 28.)

MAY 28, 2015

Approximately one year later, Ms. Lincoln filed her *Summons* and *Petition for Modification of Child Support*. (CP 35-39.)

Summons: Paragraph 2 of the *Summons* stated:

“You must respond to this summons and petition by filing a written response with the clerk of the court and by serving a copy of your response on the person signing this

summons. *You must also complete the Washington Child Support Schedule Worksheet and a Financial Declaration (Form WPF DRPSCU 0.1.1550) served with this summons.* The completed worksheet and financial declaration must be filed and served with your written response.” (CP 35; emphasis added.)

Contrary to the language contained in the *Summons*, however, Ms. Lincoln did not actually serve or file *Washington Child Support Schedule Worksheets* or a *Financial Declaration*. (CP 41.)

Petition for Modification of Child Support: In her petition, Ms. Lincoln requested the trial court to order “child support payments which are based upon the Washington State child support statutes,” and indicated that “[a] copy of the child support worksheet is filed with this action.” (CP 38.) Ms. Lincoln signed this document under penalty of perjury, but she did not actually file or serve child support worksheets as she indicated. (CP 38-39, 41.)

In *Section 1.4/Reasons for Modifying Child Support* of her petition, Ms. Lincoln confirmed that she was not claiming a substantial change of circumstances; rather, she was seeking postsecondary support based solely on the reservation of that specific issue in the original *Order of Child Support*. (CP 38.) But the modifications that were requested by Ms. Lincoln extended well beyond her purported reason for modifying child support and included modifications of health insurance provisions, the re-calculation of the child support for the parties’ minor child; and entry of an order directing the parties

to pay their proportional share of driver's education for the parties' minor child. (CP 38.) She also requested an award of attorney's fees. (CP 38.)

JUNE 25, 2015

Mr. Lehman was served in Alabama; he received the *Summons* and *Petition for Modification of Child Support* as well as discovery requests propounded by Ms. Lincoln. (CP 41.)

JUNE 29, 2015

Mr. Lehman again contacted *For Men Family Law* in Spokane, Washington to inquire about legal services and spoke to Evan Marken, an attorney with the firm. (CP 192-93.)

JULY 9, 2015

Mr. Lehman contacted *For Men Family Law* and spoke to Mr. Marken's paralegal, Ms. Robson. (CP 193.)

JULY 15, 2015

Mr. Lehman hired *For Men Family Law* to represent him. (CP 193.)

JULY 21, 2015

Mr. Lehman contacted *For Men Family Law* at 9:58 AM to find out what was needed from him in order to proceed. (CP 193.) Ms. Robson asked him to provide the documents he had been served as well as three months of bank statements and recent paystubs. (Id.) Mr. Lehman emailed the office the documents he had been served that same day at 11:51 AM. (Id.)

JULY 24, 2015

Mr. Marken entered a *Notice of Appearance* on behalf of Lane Lehman. (CP 43.) He did not provide a copy of this document to Mr. Lehman. (CP 193.)

JULY 29, 2015

Mr. Lehman submitted the requested bank statements and pay stubs to Mr. Marken. (CP 193.)

AUGUST 3, 2015

Mr. Lehman called Mr. Marken's office and asked for an update. (CP 193.) Ms. Robson told Mr. Lehman she would have Mr. Marken call him back. (Id.)

AUGUST 6, 2015

Mr. Marken filed paystubs and bank statements for a three-month period (April of 2015 to July of 2015) on Mr. Lehman's behalf. (CP 44-69.) These documents were not attached to testimony confirming that they were true or correct copies, nor were they submitted with Mr. Lehman's signature. Mr. Marken did not provide a copy of these filings to Mr. Lehman. (CP 193.)

AUGUST 14, 2015

Mr. Markel had not called Mr. Lehman back since August 3, 2015, so Mr. Lehman called Mr. Markel's office. (CP 193.) Mr. Markel spoke to Mr. Lehman and chastised him for calling too much; he told him that he would be

contacted if anything was needed or if something was filed that required his response. (CP 193.)

AUGUST 19, 2015

Mr. Lehman called Ms. Robson and told her that he was changing jobs and would have a subsequent pay decrease. (CP 193.) Ms. Robson told him to provide them with his new address and expressed no concern. (Id.)

AUGUST 24, 2015

Sixty (60) days passed since Mr. Lehman was served out-of-state, and no *Response to Petition*, *Financial Declaration*, or affidavit of any kind had been filed on his behalf. No *Washington State Child Support Worksheets* or *Financial Declaration* had been filed by Ms. Lincoln at this time, either.

SEPTEMBER 4, 2015

Mr. Marken resigned his position with *For Men Family Law* by email to its owner, an attorney named Mr. Fannin; the email indicated that his last day at the firm would be September 18, 2015. (CP 186.) Mr. Marken had approximately fifty (50) active family law files assigned to him at that time, and he had been the only attorney assigned to those cases. (CP 185.) Mr. Lehman's case was included in that group. (CP 185.)

SEPTEMBER 10, 2015

Rather than filing a motion for default as required by RCW 26.09.171(5) when Mr. Lehman failed to file a response, Ms. Lincoln filed and served a *Note for Hearing* that indicated "an issue of law in this case" would be heard

on the “Civil Motion Calendar” two weeks later on September 24, 2015. (CP 70.) Mr. Lehman never knew his case was set for a hearing. (CP 187.)

SEPTEMBER 16, 2015

About a week before the hearing “on an issue of law” that had been set by Ms. Lincoln, she filed extensive documentation with the court, including, for the first time, her *Financial Declaration*, and her *Washington State Child Support Worksheets*. (CP 116-44.) No proof of Makayla’s actual enrollment in college or testimony confirming actual enrollment was ever provided, nor were the final figures of Makayla’s financial aid award filed in the record.

Mr. Lehman was not provided copies of any of the information filed by Mr. Marken in his case (in fact, he did not receive this information until weeks after final orders had already been entered). (CP 194).

Declaration of Cynthia Lincoln: For the first time, Ms. Lincoln stated that she was “requesting that Lane be ordered to pay Mikayla’s [sic] entire need on a monthly basis so that she can go to college.” (CP 116.) She also testified that while she did work full time and received additional business income, she did not have the financial ability to make *any* contribution to postsecondary support. (CP 116.) Ms. Lincoln alleged that she had no “disposable income” and was “not in a position to assist Makayla with her post-secondary needs at all,” because “[i]f I were to attempt to do so, I wouldn’t be able to provide for Levi who still lives in the home with me.” (CP 116.) Ms. Lincoln also argued that “[a]lthough Lane failed to disclose

any other income in his household, I believe that his wife, Brook, has a soap making business which she runs out of the home.” (CP 117.)

Washington State Child Support Worksheets (Proposed): Ms. Lincoln claimed a health care credit to reimburse her for Mr. Lehman’s proportional share of a \$60 expenditure that she alleged she had made for the payment of health insurance, but she did not provide any evidence of this payment in the record. (CP 120.) She also indicated, under penalty of perjury that she had “\$50” in bank accounts and cash. (CP 121.)

Mr. Lehman’s gross income was listed in the worksheets as \$5,730/month, and his total deductions of \$950/month were included on line 2(i), resulting in a monthly net income of \$4,780/month. (CP 119.)

The “Basic Child Support Obligation” listed in Section 5 indicated the amount of \$1,203.00 for the parties’ minor son based on a one-child family calculation. (CP 119.) The postsecondary support for Makayla was not included in the worksheets anywhere, not even on Line 24, which calls for “Child Support Owed, Monthly, for Biological or Legal Children.” (CP 122.)

Financial Declaration of Cynthia Lincoln: Ms. Lincoln indicated that she had a monthly net income of \$2,118.7, including wages and business income, and that she had monthly household expenses of \$3,035.97/month. (CP 136.) She again testified that she had \$50 in cash on hand and no money on deposit in banks. (CP 138.) Among other expenses, she testified that she spent \$925/month on food for two people, that she spent \$210/month on her

clothes and hair, and that she needed \$475/month in transportation costs, which included \$100/month in “other transportation expenses.” (CP 139.)

Financial Declaration of Makayla Lehman: The parties’ child testified as to her own financial circumstances. (CP 124.) She testified that she did not live with either parent but instead lived in her own apartment, and that she had a monthly net income of \$1,052.33/month and household expenses in the amount of \$2,667.00/month. (CP 124.) She testified that she was unemployed and that her income was the result of financial aid. (CP 125.) Makayla did not indicate that there were any other adults living in her home that received income, and she indicated that she only had \$20 “cash on hand,” and \$100 “on deposit in banks.” (CP 126.) She did not identify any trust funds or certificates of deposit held in her name or for her benefit.

Declaration of Makayla Lehman: Makayla testified about her expenses and requested that the trial court order her father to pay \$1,439/month in postsecondary support while she attended school. (CP 132.)

SEPTEMBER 22, 2015

Mr. Lehman had received no communication from the law office since August 19, 2015, so he sent an email to Ms. Robson seeking an update. (CP 193-94.) He received no response. (CP 194.)

SEPTEMBER 24, 2015

The hearing proceeded as scheduled. By that time, Mr. Marken had already left *For Men Family Law*, and he had not advised any other staff at

the firm that there were pending documents to be filed or argument to be submitted to the Court, nor did he advise any firm member that Mr. Lehman had started a new job with reduced pay. (CP 185-88.) The firm had not yet hired anyone to replace Mr. Marken, so Mr. Marken agreed to appear by phone at the hearing since he was the only attorney familiar with the case. (CP 187.)

During argument, Ms. Lincoln's attorney, Mr. Webster, admitted that no responsive pleadings had been filed in the proceeding and argued that his client's documents should therefore be accepted, ostensibly by default:

MR. WEBSTER: Your Honor, at this point I'm a little bit confused because **we don't have any responsive filings from the adverse so I assume that our child support worksheets will stand.** I don't have a whole lot to say about those."

(CP 415; emphasis added.)

MR. WEBSTER: So that's really straightforward and I don't – again, **I haven't seen any responsive pleadings so I assume that would be agreed to and if not, I would ask the Court to go ahead and sign off on ours as a final order.**

(CP 415; emphasis added.)

A considerable amount of argument was spent on the issue of how postsecondary support would be enforced, and Ms. Lincoln argued that she was entitled to have it enforced by the Division of Child Support at her preference:

MR. WEBSTER: We're requesting that the amount be paid through Child Support Enforcement. We've contacted Support Enforcement and the only way to get them to do a garnishment, which we think is necessary in this case is – I've got three jackets in my office, Your Honor. This has been a highly contentious case throughout the proceedings so I don't anticipate cooperation. And that's why we'd like this to go through Support Enforcement. And I'm more than happy, my client's more than happy to have that go through Support Enforcement with the order reading that mom shall distribute the entirety of those funds on a monthly basis to the daughter.

THE COURT: Would it be possible just to pay them to Makayla Lehman?

MR. WEBSTER: It would, but don't have any way to garnish at that point, Your Honor. Support Enforcement will not enforce or do any garnishment or do anything unless it's going to the mother who's also receiving support for the son that's remaining in the home. So yes, it could be ordered to go straight to Makayla. The problem with that is Makayla has no way to enforce with any teeth. I know we could come back in on contempts, that kind of thing, but we could avoid court completely with the court's order saying that it go through Support Enforcement to the mother and that the mother, in that same order, is ordered to send it to the daughter. And that would leave the daughter recourse if the mother ever decided to keep the money, which I don't see as ever happening. For her to come to court as an adult and say look, my mom was ordered to give that to me. She hasn't. I want the court to find her in contempt. I don't see that happening by any means whatsoever. But it should ease the court's mind to know that would be available so long as the order reads that the mom shall send that amount in full to the daughter on a monthly basis.

(CP 416-17; emphasis added.)

MR. WEBSTER: Your Honor, I was writing down an order for presentment. Did you state that the amount for the college tuition we can – or for the college postsecondary can be placed into the child support order –

THE COURT: Yes.

MR. WEBSTER: ... with an indication that mother shall remit that to the daughter on a monthly basis?

THE COURT: Yes, I think that's the fairest, easiest way to accomplish the court's order here today for the Department, or Division of Child Support to be responsible for administration of that to Ms. Lincoln to then give it to Ms. Makayla Lehman.

(CP 426-27.)

Mr. Webster also argued that Ms. Lincoln was unable to make any contribution to postsecondary support at all:

MR. WEBSTER: The problem with that particular scenario in this case, Your Honor, is that if Ms. Lincoln had to put forth any of the financial aid for the child's post-secondary support, she would be left without enough funds for her son in the home.

(CP 417.)

MR. WEBSTER: So take any of those funds and put them towards post-secondary education would cause a loss of income that would be to the detriment of the minor child still in my client's home. And that's why we're asking that be shouldered by the father. The father has significant income. He always had a significant income and has I daresay a significant other living in the home with him. We requested the income of the significant other as we are entitled to, to include in that child support worksheet for the court's information. Obviously it doesn't go into the calculation. And that would give us a total household income for the father. And I don't know what that is but

we do know that there is income on top of his significant income.

(CP 417.)

Mr. Marken confirmed his understanding that the only issue before the court was the matter of postsecondary support as had been pleaded in Ms. Lincoln's petition:

MR. MARKEN This isn't an issue about child support. This is obviously the issue about the post-secondary support.

(CP 418.)

Mr. Marken spent most of his argument explaining that Mr. Lehman simply could not afford to pay the amount that Ms. Lincoln was requesting:

MR. MARKEN: So I do not, Your Honor, looking at my client's finances, see how this \$2,000 plus is going to be garnished out of his paychecks. They'd end up garnishing more than he would even make leaving my client in a precarious position...

(CP 421.)

MR. MARKEN: It's simply not feasible. So it's great that she's going to a relatively inexpensive college, but Your Honor, if you look at the financial source documents which we filed, if you look at his income, there is no way excluding the normal cost of living that my client would be able to not only pay the child support but this \$1,700 in post-secondary support. I don't see how an order could reflect that that would provide my client with any source of stability or able to live.

(CP 421.)

The trial court spent very little time discussing the parties' financial circumstances, choosing instead to adopt Ms. Lincoln's child support worksheet based on a cursory review of the gross monthly income:

THE COURT: The monthly income earned by Mr. Lehman, the gross monthly income is \$2,865, correct counselor?

MR. MARKEN: Yes, Your Honor.

THE COURT: Alright.

MR. WEBSTER: No, Your Honor.

THE COURT: That's what's reflected in the pay stubs that they submitted.

MR. WEBSTER: He gets paid twice a month, Your Honor.

THE COURT: No, I said, if I said that I mean to say every two weeks.

MR. WEBSTER: Correct.

THE COURT: That's his ...

MR. WEBSTER: Gross monthly – his gross monthly is \$5,730.

THE COURT: Correct. Now that's correct. The worksheet submitted by the respondent or the petitioner in this particular motion is accurate. It accurately reflects the income of the parties. The pay stubs submitted by Mr. Lehman indicate he earns every two weeks \$2,865 with a gross monthly income therefore is \$5,730. So the court will adopt the worksheet as submitted by Ms. Lincoln. I, and I appreciate Mr. Marken your responses and your arguments. I'm going to turn back very quickly to Makayla and her financial declaration.

(CP 423.)

After some discussion about Makayla's financial declaration and expenses, the trial court made the following ruling:

THE COURT: But the court is going to remove \$300 of the transportation request from the order here and so Mr. Lehman is responsible then for educational expenses which is appropriate as justified here by Ms. Lincoln and Ms. Makayla Lehman for Mr. Lehman to pay and contribute as a portion of his child support responsibility that he owes post-secondary education will be ordered today by the court but in the amount of \$1,139 per month, not \$1,439, so \$300 minus or taken away for the transportation cost. And however that impacts Makayla, she'll have to adjust accordingly. And I think that's something that is good for her to learn anyway. So if something's go to go, that's what's going to go here today. So \$1,139 for post-secondary education for Makayla. The incomes as reported as the court said were accurately reported and so I think there's still sufficient resources for Mr. Lehman. To go any lower or to require any further downward deviation for the child support amount for the other child, the minor child, would result in a child support amount that doesn't equitably distribute the child support obligation between the parties and leave the custodial parent with insufficient resources to meet the basic needs of the child pursuant to RCW 26.19.001, so I'm not going to disturb that amount at all. Also, the driver's education component will be split between the parties based upon the proportional share of their income as detailed in the child support worksheet and orders. Any questions, Mr. Webster?

(CP 426.)

The trial court entered an *Order on Temporary Matters* on the same day the hearing was held, and in a section labeled "Findings of Fact and

Conclusions of Law,” the trial court found that there was “good cause” to grant Ms. Lincoln’s *Petition for Modification of Child Support*, and it ordered Ms. Lincoln’s attorney to draft the orders and to provide them to Mr. Lehman’s attorney by Friday, September 25, 2015; the trial court further ordered that presentment would take place on October 1, 2015 if the parties could not agree. (CP 145-46.)

SEPTEMBER 28, 2015

Mr. Marken withdrew from representation of Mr. Lehman, and Ms. Poplawski (also of *For Men Family Law*) was substituted in his place. (CP 148.)

SEPTEMBER 30, 2015

Ms. Robson sent an email to Mr. Lehman that consisted solely of the words, “Please review,” but there was no attachment to the email. (CP 194.) Mr. Lehman emailed back to tell her there was no attachment, but she did not respond that day. (CP 194.)

OCTOBER 1, 2015

The trial court entered *Findings/Conclusions on Petition for Modification of Child Support*, an *Order on Modification of Child Support*, an *Order of Child Support*, and *Washington State Child Support Worksheets*. (CP 149-73.)

Findings/Conclusions: The trial court found two bases for modification. (CP 150). First, it stated that the order of child support should be modified

because, “[t]he previous order was entered more than a year ago and: An automatic adjustment of support should be added consistent with RCW 26.09.100.” (CP 150.) Second, it indicated that the right to request post-secondary support had been reserved; that the child was in fact dependent and relied upon the parents for the reasonable necessities of life; and that Makayla would be attending school full time and would require assistance. (CP 150.)

The trial court also found that “[a]ttorney’s fees and costs have not been requested.” (CP 150.)

Order of Child Support (Current): The trial court characterized the support proceeding as an “order for modification of child support,” and specifically, “[a]n Order for Post Secondary Support.” (CP 156-57.) Mr. Lehman’s ‘actual monthly net income’ was stated as \$4,780/month, and Ms. Lincoln’s ‘actual monthly net income’ was stated as \$2,111.95/month. (CP 157-58.) The trial court ordered Mr. Lehman to pay \$877/month for the parties’ minor child, and \$1,139/month for the parties’ adult child for a combined total monthly transfer amount of \$2,016.00/month. (CP 158.) This amount represented 42% of Mr. Lehman’s ‘actual monthly net income’ as stated in the order. In that same section, the trial court ordered that:

The mother shall transfer \$1,139.00 of this payment directly to the daughter as soon as it is received for the daughters use for her Post Secondary Education. The daughter shall confirm to the father that she has received said payments every quarter.

(CP 159.)

The trial court further determined that “[t]he additional amount ordered to be paid by the father does not constitute a deviation due to the fact that it is for Post Secondary Support of Mikayla [sic] Lehman,” and that “[a] deviation was not requested.” (CP 159.)

The order indicated that the parties were required to proportionally share “educational expenses” in addition to the “long distance transportation expenses” that had previously been ordered, and that Mr. Lehman was required to pay 69% of the cost of driver’s education classes for the parties’ minor child. (CP 161.)

No change was made to *Section 3.18/Medical Support – Health Insurance* from the previous order, which stated that neither party was required to provide coverage or contribute a sum certain and that “the court is not specifying how insurance coverage shall be provided.” (CP 23.)

Washington State Child Support Worksheets (Current): The worksheets entered by the trial court included a basic child support obligation that was based on a combined monthly net income of \$6,891.95 for a one-child family (rather than a two-child family). (CP 168.) It also awarded a credit to Ms. Lincoln for \$60 for “monthly health insurance paid for children,” even though no parent was obligated to provide coverage and no evidence related to the coverage Ms. Lincoln had purportedly purchased was ever provided to the court. (CP 169.)

Information related to postsecondary child support for Makayla was not included in the worksheets, either; Section 18, which ensures that trial court reviews a transfer payment in light of its relationship to 45% of each parent's net income, did not accurately reflect the transfer ordered by the court; rather it included only the portion related to the parties' minor child. (CP 169.)

Ms. Robson emailed copies of the final orders to Lane Lehman, who immediately called to speak to Mr. Marken. (CP 194.)

OCTOBER 26, 2015

Mr. Lehman saw the documents that had been filed by Ms. Lincoln for the first time on October 26, 2015. (CP 194.)

NOVEMBER 2, 2015

Mr. Lehman filed a *Notice of Appeal* for review of the modified child support order.

DECEMBER 23, 2015

Mr. Lehman filed his *Motion for an Order to Show Cause to Vacate Final Orders Pursuant to CR 60(b),(c)* and extensive supporting documentation. (CP 175-370.)

Declaration of Petitioner, Lane Lehman: Mr. Lehman testified to the events leading up to the trial court's modification of the child support order, including the lack of communication by his attorney. (CP 192-202.)

More troublingly, Mr. Lehman testified that Mr. Marken had failed to submit his current pay information to the court, which was the result of a

change in employment. (CP 197.) Mr. Lehman testified that he had a 10th grade education and no high school diploma or GED, and that he had worked for the railroad since 2004. (CP 197.) Mr. Lehman's actual monthly gross income at the time of the hearing was \$4,833.33 not \$5,730.00 as the court had determined from the outdated pay stubs in the file. (CP 179.) His actual monthly net income was \$4,114.43 not \$4,780. (CP 200.) As a result, the total child support obligation ordered by the trial court amounted to 49% of Mr. Lehman's monthly net income.

Mr. Lehman also testified that Makayla had a college fund as part of an inheritance Cynthia had received prior to divorce that had not been disclosed to the court. He also indicated his belief that his daughter was living with her boyfriend in the apartment and his basis for that position, and he referenced the considerable assets Ms. Lincoln had received approximately a year prior, including a large amount of cash, that had not been referenced in Ms. Lincoln's financial disclosures to the court.

Financial Declaration of Lane Lehman: Mr. Lehman's financial declaration submitted evidence to the trial court that his total monthly expenses were \$5,159/month, which already exceeded his income by over a thousand dollars per month. (CP 269.)

Washington State Child Support Schedule Worksheets (Proposed): Mr. Lehman's proposed child support worksheets (which included his actual income and calculated the basic child support obligation based on a two-child

family) indicated that the transfer payment for the parties' minor child should have been \$570/month. (CP 279.)

Declaration of Counsel, Patrick Fannin: In his declaration, Mr. Fannin testified that he was the owner of *For Men Family Law*, and he explained that his area of practice was in personal injury and his role in the firm had been confined to marketing and general office management. (CP 185.) Mr. Fannin had hired an associate, Evan Marken, to manage family law clients. (CP 185.) Mr. Marken had been employed with the firm for approximately eleven (11) months, and during that time, Mr. Fannin had regular meetings with Mr. Marken and observed him with his clients and had no reason to suspect that he was not properly managing his work or that he would fail to file an appropriate response to an important motion. (CP 185-87.) On Friday, September 4, 2015, Mr. Fannin received an email from Mr. Marken saying that he was quitting and that his last day of employment would be September 18, 2015, which only gave Mr. Fannin nine (9) business days to find a replacement. (CP 186.) Within hours, Mr. Fannin began extensive efforts to find a replacement attorney, calling his personal friends, emailing every single attorney in Eastern Washington who had reported to the Washington State Bar Association as practicing in Family Law, posting on Facebook and Craigslist, and submitting a listing to Gonzaga University School of Law Career Services. (CP 186.) As Mr. Marken's last day drew nearer, Mr. Fannin asked him if he would be willing to appear at Mr. Lehman's hearing

since he had not yet hired a replacement, and Mr. Marken agreed. (CP 187.) Mr. Fannin testified that at that time he had no idea that Mr. Marken had failed to file any responses, that he had failed to communicate anything about the status of the proceeding to Mr. Lehman; he expected Mr. Marken to seek a continuance. (CP 187.) It was also Mr. Marken who approved the final orders drafted by Mr. Webster for entry. (CP 187.) Shortly thereafter, Mr. Fannin spoke with Mr. Lehman, and for the first time discovered the magnitude of the problem. (CP 187.) Mr. Fannin immediately filed an appeal and brought the motion to vacate at no charge to Mr. Lehman. (CP 188.) Mr. Fannin made the following plea to the court in his declaration:

I cannot sufficiently articulate my dismay at discovering the extent of Mr. Marken's failures and the resulting impact on trusting clients. It has required innumerable hours to assess all of the files and determine the extent to which he failed to adequately represent our clients and to determine how to address each situation in order to make things right. I have personally taken responsibility for doing this in each instance, which is my obligation as the managing attorney and simply the right thing to do. I write this declaration to plead with the Court not to punish Mr. Lehman by insisting on a clearly inequitable outcome in a matter of equity.

(CP 188.)

Mr. Fannin further offered to anticipatorily address any argument by the opposing party with respect to prejudice by offering to personally pay Ms. Lincoln's reasonable attorney's fees for the cost of the previous hearing and any time expended on drafting final orders in order to return her to the position she was in at the time of hearing. (CP 188.)

Memorandum: In his memorandum, Mr. Lehman argued that the court's modification should be vacated pursuant to CR 60(b)(1) and (11). (CP 192.) Mr. Lehman also argued for vacation based on the court's independent power to relieve a party from judgment as confirmed by CR 60(c). (CP 192.) Mr. Lehman argued that the matter was irregular because it had not proceeded according to proper statutory procedure in numerous ways, but particularly in that a response should have been filed before a trial on the merits as permitted to proceed. (CP 192.) He also argued that because the trial court proceeded without sufficient evidence to consider all the statutory factors for postsecondary support and because it enforced postsecondary support in violation of statute, the matter was further irregular. (CP 192.) Mr. Lehman also referenced the apparent misrepresentations made by his daughter regarding her dependent status as a basis to vacate under CR 60(b)(4). (CP 196.) Finally, Mr. Lehman requested vacation of the order pursuant to CR 60(b)(11) based on his total exclusion from participation in or knowledge of his own case and emphasized the court's preference that matters be determined on their merits in the interests of equity. (CP 196.)

JANUARY 26, 2016

Declaration of Makayla Lehman: (CP 372-76.) Makayla filed a declaration stating that she did not live with her boyfriend, saying he "sometimes visits me at my apartment," but that "he doesn't reside with me nor receive mail at my address." (CP 372.) Ms. Lehman submitted a copy of

her rental contract as evidence. (CP 375.) (It is worth noting that Ms. Lehman's lease had been executed subsequent to Mr. Lehman's motion.)

JANUARY 27, 2016

Response in Opposition: Ms. Lincoln filed a response to Mr. Lehman's memorandum. (CP 377-89.) In her "Facts" section, Ms. Lincoln alleged that, "The mother served all substantive documents to counsel for the father within the proper time frames pursuant to the rules." (CP 377.) She never identified the rules to which she referred. Ms. Lincoln argued that since no objections to anything had been made, the incompetence or neglect of a party's own attorney is not sufficient grounds for relief from a judgment. (CP 378.) Further, she argued that Mr. Lehman's failure to object to the numerous violations of statute were invited error and could not be entertained in a motion to vacate. (CP 380.)

JANUARY 28, 2016

Memorandum in Strict Reply: Mr. Lehman filed his memorandum in strict reply and began by objecting to Ms. Lincoln's extremely late-filed response in violation of LCR 6(d)(2)(c). (CP 405-29.) He confirmed his position that pay stubs submitted pursuant to an unsworn coversheet were not "pleadings" within the meaning of RCW 26.09.175(4) and noted that Ms. Lincoln's own attorney had admitted at hearing that "I haven't seen any responsive pleadings." (CP 406.) Mr. Lehman also responded that if anything, *Ms. Lincoln* had invited the error by scheduling a hearing in

violation of the statutory requirement that responsive pleadings be filed first. (CP 406.)

Mr. Lehman reiterated that the court could not have considered all the required factors contained in RCW 26.19.090 prior to awarding postsecondary support because there was insufficient information in the record to do so. (CP 407.) When the court decided to modify support, there was no information in the record related to the parties' expectations for the children when they were together; there was no information about the parents' level of education, standard of living, and/or future resources, nor any information related to the amount and type of support that the child would have been afforded if the parents had stayed together. (CP 408.)

Hearing Transcript: The matter proceeded to hearing before Commissioner Turplesmith. (CP 441-77.)

In discussing RCW 26.09.175 and the issue of responsive pleadings, the court indicated that it did not interpret the statute to require responsive pleadings prior to a hearing, saying, “[i]n that small sentence there is no language that is mandatory, as I understand, even the most basic statutory interpretation, to me – there’s no, “shall,” uh, not even, “must,” it’s “may,” which is permissive.” (CP 454.) Mr. Lehman’s attorney argued that the parties are permitted to file a hearing *after* responsive pleadings are filed, but they do not have permission to do so *prior* to the filing of responsive pleadings; therefore, the issue was not a question of permissive vs. mandatory

language, but rather a question of *when* a party is permitted by statute to proceed. (CP 454-55.) She went on to argue that without a responsive pleading, the proper next step for Ms. Lincoln would have been to file for default, rather than attempting to ‘have her cake and eat it too’ by proceeding on the merits while simultaneously arguing that the court should accept her position without scrutiny based on the presumption that it was undisputed. (CP 455.)

The trial court stated that the previous hearing had not been a default proceeding, and that it was a “full-fledged hearing,” because argument had been heard on both sides. (CP 455.) Mr. Lehman’s attorney responded that without any affidavits or formal pleading, there was no evidence the court could have considered from Mr. Lehman. (CP 456.)

With respect to Mr. Lehman’s argument that the court had failed to consider all the statutory factors required by RCW 26.19.090, the court stated that:

But, “The court shall exercise its discretion when determining whether and for how long to award post-secondary educational support based upon consideration of the factors which include, but are not limited to, the following,” and then it lists a number of them and **that type of wording in the statute is, uh, one that invites the Court to consider as many or as little factors as it wants to.** It’s not an – a exhaustive list like it has to – the Court has to consider one, two, three and four. **It can consider these things or more things, or less things. It’s the Court’s absolute discretion.**

(CP 457; emphasis added.)

Ms. Watts specifically clarified with the court whether it believed the record needed to contain substantial evidence for each factor listed in RCW 26.19.090, and the trial court responded:

No, and the Court has to show substantial evidence for the factors it relies on to make its decision, **but that the statute, 26.19.090, paragraph 2, doesn't have an exhaustive list of definite factors that have to be considered.** It has a list of factors that the Court may consider... including but not limited to those that are listed in that paragraph.

(CP 457.)

The trial court ruled that there had been no irregularities in the proceedings, that it had had sufficient information in the record to support its decision, and that the Court relied upon substantial evidence for the factors it chose to consider. (CP 474.)

FEBRUARY 8, 2016

Motion to Revise Commissioner's Ruling: Mr. Lehman moved to revise Commissioner Turplesmith's ruling. (CP 438-39.)

FEBRUARY 17, 2016

Proposed Findings and Order (Lincoln): Ms. Lincoln submitted her proposed *Findings and Order RE Motion for Order to Show Cause to Vacate Final Orders Pursuant to CR 60(b)(c)*. (CP 480-84.) Ms. Lincoln proposed findings and conclusion that greatly exceeded and sometimes even contradicted the court's oral ruling, including the finding on page 2, "[t]he seven factors as outlined in RCW 26.19.090(2) were considered." (CP 481.)

Proposed Findings, Conclusions, and Order (Lehman): Mr. Lehman also submitted a proposed order. (CP 485-87.) His document cited each finding to the hearing transcript.

FEBRUARY 18, 2016

Hearing Transcript: The parties went to hearing on presentment. (RP 4-13.) Ms. Watts objected to Ms. Lincoln’s proposed order, stating that it included information that was not determined or discussed by the court and that the information included greatly exceeded the ruling of the court. (RP 7.) Mr. Webster acknowledged that he significantly expanded on the court’s ruling and supplemented the findings saying “[t]hose things that are statutorily necessary to determine child support were put in there,” and noting for the court that “you’re not bound by the actual record until an order is signed.” (RP 8, 11.)

The court ruled that while the discussion during the hearing got “theoretical at times,” “in the end it was that the insufficient performance by Mr. Marken was not enough to overturn the Court’s decision and therefore the motion was denied.” (RP 11.) The court concluded that Ms. Lincoln’s order “encapsulate[d] the Court’s decision most effectively with the case law citations and other statutory citations.” (RP 11.) The court acknowledged that it was entering the order over Ms. Watts’ objection. (RP 12.)

Findings and Order: The trial court entered Ms. Lincoln’s proposed order with two small corrections. (CP 488-92.)

FEBRUARY 23, 2016

Hearing Transcript: Mr. Lehman's *Motion to Revise* was heard and denied by the Honorable Patrick A. Monasmith. (RP 15.)

It is worth noting that during this hearing, Ms. Lincoln's attorney stated that the additional information he had included in the order signed by the commissioner had been included "with an abundance of caution to make sure as we moved forward the appeal that here's no question about the fact that the Court did look at the seven factors, did make findings that the child is dependent and in need..." (RP 25.)

MARCH 7, 2016

Mr. Lehman filed a *Notice of Appeal* seeking review of the *Order on Motion to Revise Commissioner's Ruling*.

V. ARGUMENT

STANDARD OF REVIEW: A trial court's modification of an order for child support is reviewed for an abuse of discretion. *In re Goude*, 152 Wn.App. 784, 790, 219 P.3d 717 (2009); *Schumacher v. Watson*, 100 Wn.App. 208, 211, 997 P.2d 399 (2000). A court of appeal reviews "the trial court's findings of fact following a trial by affidavit to determine whether they are supported by substantial evidence, and whether the trial court made a correctable legal error." *In re Marriage of Shellenberger*, 80 Wn.App. 71, 80-81, 906 P.2d 968 (1995), citing *In re Marriage of Stern*, 68 Wn.App. 922, 929, 846 P.2d 1387 (1993). "A court necessarily abuses its discretion if its

decision is based on an erroneous view of the law.” In re Marriage of Scanlon, 109 Wn.App. 167, 174-75, 34 P.3d 877 (2001), citing Wash. State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993).

“The interpretation of statutory language is a question of law that we review de novo.” In re Marriage of Cota, 177 Wn.App. 527, 540, 312 P.3d 695 (2013), citing Advanced Silicon Materials, LLC v. Grant County, 156 Wn.2d 84, 89, 124 P.3d 294 (2005).

A. The trial court erred when it modified any portion of the child support order unrelated to postsecondary educational support without first finding a substantial change in circumstances or an exception to the requirement that a substantial change in circumstances must be demonstrated.

Unless an issue is subject to one of the enumerated exceptions in RCW 26.09.170(1) or reserved in the language of the child support order, a child support order cannot be altered unless there has been a showing of a substantial change of circumstances. In re Marriage of Morris, 176 Wn.App. 893, 901, 309 P.3d 767 (2013). “The substantial change in circumstances requirement limits modification of an existing order only to issues that were not contemplated at the time the original order was entered.” Morris, 176 Wn.App. at 902, 309 P.3d 767; Scanlon, 109 Wn.App. at 173, 34 P.3d 877.

In this case, Ms. Lincoln referenced neither a substantial change of circumstances nor an enumerated exception within RCW 26.09.170. (CP 38.) The only basis Ms. Lincoln included in *Section 1.4/Reasons for Modifying*

Child Support was the reservation of postsecondary educational support in the original *Order of Child Support*. (CP 38.)

Nevertheless, the trial court made numerous modifications to the child support order that were entirely unrelated to the reserved issue of postsecondary educational support and for which there was no statutory basis for modification:

1. *The trial court erred when it modified child support for the parties' minor child.*

The trial court modified the basic child support obligation for the parties' minor child based on new financial information for the parties and the adoption of a one-child family calculation basis (the previous worksheet used a two-child family calculation basis). This resulted in an increase of child support for the minor child from \$558.83 to \$877.00 without any statutory basis for modification, which was an abuse of discretion. (CP 21, 158.)

2. *The trial court erred when it modified Mr. Lehman's payment schedule.*

The trial court modified the order of child support to require Mr. Lehman to pay the entirety of his monthly child support obligation in one lump sum rather than in two equal payments as he previously had. (CP 21, 159.) Given that his child support obligation accounts for 43-50% of his income, this is a substantial burden. The trial court had no statutory basis to modify the payment schedule portion of the child support order, and it made no findings related to such a modification. There is no evidence in the record that

addresses the payment schedule. The trial court abused its discretion by modifying the payment schedule contained in the order of child support.

3. The trial court erred when it modified the Order of Child Support to add an automatic adjustment of support.

Ms. Lincoln did not include anything in her petition related to an automatic adjustment of support. (CP 37-39.) Mr. Lehman was given no notice that such a request was being made. In order to amend the basis of her request for modification and her requests for relief, Ms. Lincoln is required to amend her petition pursuant to CR 15, which she did not do. The court did not discuss this request at hearing nor did it make findings related to the need for an automatic adjustment of support in its oral ruling. The record contains no evidence related to an automatic adjustment of support. The trial court abused its discretion when it modified the automatic adjustment provision of the child support order.

4. The trial court erred when it modified the parties' obligation to pay their proportional share of "educational expenses."

The trial court modified the child support order with respect to the payment of educational expenses unrelated to the postsecondary support for the parties' adult child. The trial court had no statutory basis to modify the "Payment for Expenses Not Included in the Transfer Payment" portion of the child support order or to require Mr. Lehman to pay for driver's education for the parties' minor child, and it made no findings to support such a modification. Support orders may be modified only upon an unanticipated

change of circumstances occurring since the former decree. Wagner v. Wagner, 95 Wn.2d 94, 98, 621 P.2d 1279 (1980). It is not persuasive to suggest the parties did not contemplate one short year ago that their 15 year-old son would soon be wanting to drive and would need to enroll in driver's education. The trial court abused its discretion by modifying the child support order in violation of statute.

B. The trial court erred when it violated substantive and procedural statutory requirements and entered postsecondary educational support based on findings for which there was no substantial evidence in the record.

- 1. The trial court erred when it awarded postsecondary support without considering the factors set forth in RCW 26.19.090(2).*

In order to make an award of postsecondary support, the trial court must initially find that the child is dependent and “relying upon the parents for the reasonable necessities of life.” RCW 26.19.090(2); Cota, 177 Wn.App. at 537, 312 P.3d 695; Morris, 176 Wn.App. at 904, 309 P.3d 767. “Once that threshold requirement is satisfied, the trial court *must* also consider the following nonexhaustive list of factors: Age of the child; the child's needs; the expectations of the parties for their children when the parents were together; the child's prospects, desires, aptitudes, abilities, or disabilities; the nature of the postsecondary education sought; and the parents' level of education, standard of living, and current and future resources”; also to be considered are the “amount and type of support that the child would have been afforded if the parents had stayed together.” Cota, 177 Wn.App. at 537-

38, 312 P.3d 695(emphasis added), citing RCW 26.19.090(2); *see also*, Morris, 176 Wn.App at 904, 309 P.3d 767; In re Marriage of Newell, 117 Wn.App. 711, 718, 72 P.3d 1130 (2003). A court need not explicitly discuss matters on the record, but there must be evidence and argument regarding the factors in the record for the court to have considered in order for a reviewing court to determine there was compliance with the statute. Cota, 177 Wn.App. at 537, 312 P.3d 695, citing Morris, 176 Wn.App at 906, 309 P.3d 767); *see also* In re Marriage of Kelly, 85 Wn.App 785, 792-93, 934 P.2d 1218 (1997). “As long as the court considers all the relevant factors set forth in RCW 26.19.090 for determining post-secondary support, it does not abuse its discretion.” Goude, 152 Wn.App. at 791, 219 P.3d 717; citing Kelly, 85 Wn.App. at 792-93, 934 P.2d 1218. “A trial court does not abuse its discretion where the record shows that it considered all the relevant factors and the child support award is not unreasonable under the circumstances.” State v. Van Guilder, 137 Wn.App. 423, 154 P.3d 243 (2007); Stern, 57 Wn.App at 717, 789 P.2d 807.

Here, the trial court explicitly *did not* consider all the factors (as it stated on the record) based on its articulated belief that it was not required to do so. (CP 457.) Ms. Lincoln’s attorney attempted to cure the situation by presenting an order that made the opposite statement (that all the factors *had* been considered), which the trial court signed and entered over Ms. Watts’ objection; however, there was not substantial evidence in the record that

would have enabled the trial court to consider all the statutory factors, so the error is not cured by Ms. Lincoln's attorney's careful drafting.

There was no information available in the record as to what the expectations of the parties were for their children when the parents were together. RCW 26.19.090(2). There was no information available in the record as to the child's particular aptitudes, abilities or disabilities. *Id.* There was no information available in the record as to the parents' level of education. *Id.* There was no information in the record as to Mr. Lehman's standard of living or his current and future resources. *Id.* There was no information available in the record as to the amount and type of support that the child would have been afforded if the parents had stayed together. *Id.* As a result, the trial court could not have considered this information, and it failed to consider the factors as required by statute.

Further, the child support ordered was not reasonable under the circumstances. Even if the income determined by the trial court had been accurate, the court ordered Mr. Lehman to pay child support amounting to 43% of his monthly net income without any consideration of his financial circumstances and in the absence of any financial declaration or affidavits of any kind while simultaneously excusing Ms. Lincoln from paying *any* postsecondary support based solely on her own self-serving statements regarding her expenses. This decision violated statute and legislative intent. RCW 26.19.001; In re Ayyad, 110 Wn.App. 462, 467, 38 P.3d 1033

(2002)(child support is to be equitably apportioned between both parents). The trial court, therefore, erred as a matter of law when it entered postsecondary support in violation of statutory requirements, and it abused its discretion in entering postsecondary support without consideration of substantial evidence.

Because the trial court miscalculated Mr. Lehman's income based on the information before it and because it ultimately did not have accurate information before it in the first place, the result was a child support obligation that exceeded 45% of Mr. Lehman's monthly net income. A trial court errs when it sets a party's child support obligation, including postsecondary educational support, at an amount greater than 45 percent of that party's monthly income; "[P]ostsecondary educational support is part of a parent's 'child support obligation' for the purposes of the 45 percent limitation in RCW 26.19.065(1)." *Cota*, 177 Wn.App. at 542, 312 P.3d 695.

2. *The trial court erred when it ordered postsecondary support to be paid to the mother and enforced by DCS in violation of RCW 26.19.090.*

RCW 26.19.090(6) states that "either or both parents' payments for postsecondary educational expenses [are] to be made directly to the educational institution if feasible." Then, if they are not feasible, the court has discretion to order that payments be made directly to the child if the child does not live with the other parent. RCW 26.19.090(6). Only if the child lives with the other parent and if payments to the institution are not feasible

may the payment be made to the parent who has been receiving support transfer payments. RCW 26.19.090(6).

There is no evidence in the record that payment to the institution is not feasible, but even if it were assumed that such payment was not feasible, Makayla does not live with Ms. Lincoln, so the alternative is to allow direct payments to be made by Mr. Lehman to Makayla. The court did not do this, however; rather, the court was persuaded by Mr. Webster's argument that enforcement would be *preferred* because the case had been contested. Mr. Webster argued that he did not want to have to pursue any contempt motions in the future in the off-chance that Mr. Lehman did not comply with his obligation (which is a puzzling argument given that Ms. Lincoln herself submitted evidence that Mr. Lehman had been compliant in paying his child support). (CP 71.). Instead, Mr. Webster argued that it would be preferable to have Mr. Lehman's wages garnished and provided to Ms. Lincoln by DCS, after which *she* would directly pay Makayla who would periodically confirm receipt of those funds for Mr. Lehman. He noted that if anything went awry, Makayla could always bring a contempt proceeding against her mother. Other than being remarkably convoluted, this methodology (direct payment by one parent rather than another) does not provide any increased benefit to the parties' child; rather, it simply violates statute without basis in law or substantial evidence in the record to justify it. It also creates an appearance of unfairness and secures a method for Ms. Lincoln to maintain continuing

control over Mr. Lehman, which is a disfavored outcome between divorced parents.

The trial court erred as a matter of law when it awarded relief it was not authorized to award, and it abused its discretion in finding that such relief was justified without substantial evidence in the record to support it.

3. *The trial court erred when it failed to conduct a proper trial on the affidavits.*

RCW 26.09.170 explains how and when a child support order can be modified. “It contemplates only two methods of altering an existing order: a petition for modification or a motion for adjustment.” Morris, 176 Wn.App at 901, 309 P.3d 767; RCW 26.09.170. “A petition normally results in a *trial by affidavit*, while a motion generally results in a hearing without live testimony.” Morris, 176 Wn.App at 903, 309 P.3d 767 (emphasis added); RCW 26.09.175(6); CR 43(e)(1).

“A request for postsecondary educational support is not among the enumerated exceptions that can be accomplished by a motion for adjustment”; therefore, “[a] petition for modification is required.” Morris, 176 Wn.App at 902, 309 P.3d 767. When postsecondary support has been reserved, the issue should be raised by petition for modification, and the decision should be made as if it were being decided in an initial dissolution proceeding; no substantial change of circumstances threshold applies. Id.

“The action begins by filing a petition, along with financial worksheets, and serving the other party.” Morris, at 901; RCW 26.09.175(1), (2). Ms. Lincoln did not do this; therefore, there is some question as to when the action has properly “begun” such that it could be concluded that Mr. Lehman has been given notice of the claims against him and the matter may be considered ready for evaluation by the court.

RCW 26.09.175 states that if a responding party fails to answer within the time required, such a failure “*shall* result in entry of a default judgment for the petitioner.” (Emphasis added.) The trial court did not enter a default judgment on the petition, rather it proceeded in violation of statute.

“Once the other party responds, any party may schedule the matter for hearing.” Morris, 176 Wn.App at 901, 309 P.3d 767; RCW 26.09.175(5). Ms. Lincoln scheduled the matter for hearing without any responsive filings in the record, and the trial court conducted the hearing without any responsive filings in the record.

Pursuant to LCR 40, any party desiring to bring an issue of fact to trial shall serve and file a properly completed *Notice for Trial Setting and Certificate of Readiness* and note the matter for trial, giving the other party the opportunity to object. LCR 40. If the other party does not object, she/he certifies that there has been reasonable opportunity for discovery and that discovery will be complete by the trial date. Ms. Lincoln did not comply with this rule; rather, she set a the matter for hearing on the regular motion docket

as “an issue of law” (as opposed to fact) and failed entirely to provide Mr. Lehman with proper notice of what was to be addressed such that he could reasonably object. (CP 70.) In fact, Mr. Webster stated at the very end of the hearing after the trial court had made its ruling, “[a]nd Your Honor, according to the rules, this would be a final hearing. No trial is needed on a child support issue, and I request that this be a final order that we sign off on next Thursday.” (CP 427.) Mr. Webster is incorrect that no trial is needed on a child support modification and his statement confirms that neither he nor the court had clearly indicated the nature of the hearing.

“Unless otherwise requested, the petition is heard on affidavits, the petition, the answer, and the financial worksheets only.” Morris, 176 Wn.App at 901, 309 P.3d 767; RCW 26.09.175(6). The trial court considered no answer, affidavits, or financial worksheets from Mr. Lehman.

Pursuant to RCW 26.19.035(3), “[t]he court shall not accept incomplete worksheets”; however, here, the trial court accepted incomplete worksheets from Ms. Lincoln, who did not provide any information in the worksheet related to postsecondary support or any information in Part VIII except for line ‘d.’ (CP 168-73.)

C. The trial court erred when it denied Mr. Lehman’s motion to vacate the child support order and subsequently entered findings of fact in the absence of substantial evidence in the record to support them.

STANDARD OF REVIEW: A superior court’s decision on a motion to vacate is reviewed for abuse of discretion. Calhoun v. Merritt, 46 Wn.App

616, 619, 731 P.2d 1094 (1986). Generally, a court of appeal reviews the superior court's ruling, not the commissioner's, but "when the superior court denies a motion for revision, it adopts the commissioner's findings, conclusions, and rulings as its own." Van Guilder, 137 Wn.App. at 423.

1. The trial court should have granted Mr. Lehman's Motion to Vacate.

A proceeding to vacate or set aside a judgment is equitable in character, and "the relief sought or afforded is to be administered in accordance with equitable principles and terms." White v. Holm, 73 Wn.2d 348, 351, 438 P.2d 581 (1968). When dealing with a motion to set aside an order, a court "should exercise its authority liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done." White, 73 Wn.2d at 351. The overriding reason when determining whether vacation of an order is appropriate should be "whether or not justice is being done.. [w]hat is just and proper must be determined by the facts of each case, not by a hard and fast rule applicable to all situations regardless of the outcome." Calhoun, 46 Wn.App. at 619, 731 P.2d 1094.

In the underlying case, Mr. Lehman sought vacation of the child support order for two main reasons: (1) based on his claim pursuant to CR 60(b)(1) that the proceeding's compounding irregularities justified relief from the judgment and (2) his claim pursuant to CR 60(b)(11) that his total exclusion from participation in his case justified relief. (CP 189-97, 405-10.)

Irregularity: An irregularity in obtaining an order exists, “when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unreasonable time or in an improper manner.” Lane v. Brown & Haley, 81 Wn.App. 102, 106, 912 P.2d 1040 (1996).

The proceedings in this case were so irregular and riddled with statutory violations and procedural error that they violated Mr. Lehman’s right to due process. Issues affecting fundamental constitutional rights may be raised for the first time on appeal. RAP 2.5(a)(3).

Mr. Lehman is entitled to proper notice of the claims being made against him. Parties should not be “required to guess against which claims they will have to defend.” Kirby v. City of Tacoma, 124 Wn.App. 454, 470, 98 P.3d 827 (2004). Mr. Lehman did not receive timely notice of the claims being made by Ms. Lincoln nor did he receive appropriate notice of the nature of the hearing wherein those claims were to be determined. Even setting aside the problems caused by Mr. Marken, there is no indication in the record that Mr. Lehman was provided reasonable notice of what relief Ms. Lincoln was seeking or when she intended to procure it.

A respondent is entitled to the protection of the Civil Rules. “The right of every individual to claim protection of the laws is the very essence of civil liberty, and it is one of the first duties of government to afford that

protection.” Putman v. Wenatchee Valley Medical Center, P.S., 166 Wn.2d 974, 979, 216 P.3d 374 (2009).

Mr. Lehman is entitled to the opportunity to conduct discovery on any claims made against him. “The right of access to the courts is constitutional and includes the right of discovery authorized by the civil rules.” Lowy v. Peacehealth, 174 Wn.2d 769, 776, 280 P.3d 1078 (2012). “Our rules of discovery are grounded upon the constitutional guaranty that justice will be administered openly.” Lowy at 788. Here, Mr. Lehman received Ms. Lincoln’s specific claims mere days before the hearing and no notice of what type of hearing as to be held. The trial court made no efforts to comply with the requirements of a multitude of statutory requirements, and the confused proceedings have resulted in significant prejudice to Mr. Lehman who has been paying well over half of his income based on information that is undisputedly inaccurate.

“Catch-all”: CR 60(b)(11) allows a court to vacate a judgment for “any other reason justifying relief from the operation of the judgment.” CR 60(b)(11) applies only in extraordinary circumstances relating to irregularities that are “extraneous to the action of the court or go to the question of the regularity of its proceedings”; in particular, where “irregularities that affected the proceedings below were entirely outside the control of the plaintiff, the defendant, and the court.” Barr v. MacGugan, 119 Wn.App. 43, 48, 8 P.3d 660 (2003).

In Barr, Division I of the Court of Appeals considered whether CR 60(b)(11) properly applies to situations where an attorney’s behavior “effectively deprives a diligent but unknowing client of representation.” Barr, 119 Wn.App. at 48, 8 P.3d 660. The court considered the case of Cmty. Dental Servs. V. Tani, 282 F.3d 1164 (9th Cir. 2002), where the Ninth Circuit Court of Appeals “held that an attorney’s gross negligence may be grounds to set aside a judgment under F. R. Civ. Pro. 60(b)(6), the federal “catch-all” counterpart to CR 60(b)(11).” Barr, 119 Wn.App. at 47, 8 P.3d 660. The Tani court determined that “relief can be granted where the attorney’s conduct essentially ‘vitiat[es] the agency relationship that underlies our general policy of attributing to the client the acts of the attorney.’” Barr 119 Wn.App. at 47, quoting Tani, 282 F.3d at 1171. Division I noted that the Tani court’s decision was in accord with the majority of federal courts. Id; see e.g., L.P. Steuart, Inc. v. Matthews, 329 F.2d 234 (D.C. Cir. 1964)(holding that relief justified where personal problems of counsel caused him to grossly neglect a diligent client’s case and mislead the client). Division I noted: “there is no basis for attributing the attorney’s “acts” to the client when the agency relationship has disintegrated to the point where as a practical matter there is no representation.” Id at 48.

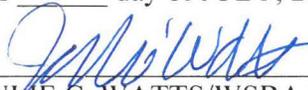
Based on these principles, Division I affirmed vacation where an attorney’s mental illness resulted in a judgment against the client, but it declined to consider whether such a ruling would apply to “gross negligence”;

however this reasoning remains compelling with respect to Mr. Lehman who can clearly demonstrate his diligence and the extent to which he and the other members of *Family Law for Men* were misled to their detriment by Mr. Marken. Id. This is particularly true for matters like child support where the primary concern of the court is equity between the parties and sufficient resources for the parties' children; it does not serve any legislative purpose to adhere to a draconian and unreasonable standards in the face of clear injustice. Providing Ms. Lincoln with a windfall and subjecting Mr. Lehman to substantial hardship does not further any policy or intent underlying the child support statutes, particularly when Ms. Lincoln has not come to the issue with clean hands when it comes to ensuring the matter is properly heard on the merits. Her refusal to provide notice of her claims until the week before hearing (in violation of the governing statute) is one example that demonstrates a level of gamesmanship that ought not to be encouraged by the judicial system. Ms. Lincoln acknowledges that the information considered by the court as inaccurate, and she cannot demonstrate any prejudice to her that would result from allowing the matter to be heard on the merits with accurate information. The trial court erred when it refused to vacate Mr. Lehman's motion based on its conclusion that "in the end it was that the insufficient performance by Mr. Marken was not enough to overturn the Court's decision and therefore the motion was denied." (RP 11.)

VI. CONCLUSION

Mr. Lehman respectfully requests this Court to reverse the trial court's modification of the child support order and remand the matter for a proper hearing on the merits.

RESPECTFULLY SUBMITTED this 27 day of JULY, 2016,



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Attorney for Appellant

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- ¹ Section 3.6 of the *Order of Child Support*; "\$877.00 per month for Levi Lehman. (See Worksheet line 17.)"
 - ² Section 2.6 of the *Findings/Conclusions on Petition for Modification of Child Support*; "Payments should be made to the Washington State Support Registry."
 - ³ Section 2.3 of the *Findings/Conclusions on Petition for Modification of Child Support*; "The order of child support should be modified because: The previous order was entered more than a year ago and: An automatic adjustment of support should be added consistent with RCW 26.09.100."
 - ⁴ Section 2.3 of the *Findings/Conclusions on Petition for Modification of Child Support*; "An automatic adjustment of support should be added consistent with RCW 26.09.100."
 - ⁵ Section 2.1 of the *Order of Child Support*; "This order is entered under a petition for dissolution of marriage or domestic partnership, legal separation, or declaration concerning validity: order for modification of child support. Other: An Order for Post Secondary Support."
 - ⁶ Section 2.3 of the *Findings/Conclusions on Petition for Modification of Child Support*; "Mikayla Lehman is in need of post-secondary support because the child is in fact dependent and is relying upon the parents for the reasonably necessities of life. Mikayla Lehman will be attending school full time, and will require assistance as a dependent from her parents for the necessities of life due to the inability to earn income as a full time student."
 - ⁷ Section 3.2A of the *Order of Child Support*; "Actual Monthly Net Income: \$4,780.00."
 - ⁸ Section 3.7 of the *Order of Child Support*; "The child support amount ordered in paragraph 3.5 does not deviate from the standard calculation. (The additional amount ordered to be paid by the father does not constitute a deviation due to the fact that it is for Post-Secondary Support of Makayla Lehman.)"
 - ⁹ Section 3.9 of the *Order of Child Support*; "A deviation was not requested."

FILED

JUL 27 2016

**COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON**
By _____

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

In re:

LANE LEHMAN,

Petitioner,

and

CYNTHIA LEHMAN (n.k.a. LINCOLN),

Respondent.

NO. 338681

CERTIFICATE OF SERVICE

On July 27, 2016, a true and correct copy of the *Appellant's Opening Brief* was hand-delivered to the individual listed below:

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The Law Office of D.C. Cronin
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RESPECTFULLY SUBMITTED THIS 27th DAY OF JULY, 2016.



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